IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPLICATION NO. 1 OF 2001

The Commissioner of Customs (Import) .. Applicant

V/s

S.C. Gupta & Ors. .. Respondents

Mr.P.S. Jetly for the Applicant.

Mr.Narayan Sahu with Ms.S.T. Shaikh for Respondent No.8.

Ms.Tasneem Saria with Mr.Nitin Pradhan i/b S.K. Srivastava & Co. for Respondent No.14.

CORAM : H.L. GOKHALE & V.R. KINGAONKAR, JJ.

DATE : 27TH JULY 2006

ORAL JUDGMENT: (Per H.L. Gokhale, J.)

1. Heard Mr.Jetly in support of this Application and Mr.Sahu for Respondent No.8. Ms.Saria appears for Respondent No.14.

2. This is an application by the Commissioner of Customs (Import) for a reference to the High Court for determination of certain questions of law arising out of the decision of the Customs, Excise and Gold Control Appellate Tribunal from its order dated 9th June 2000.

3. There are seven companies of Rastogi Group of Delhi.

Consequent upon certain information received by the Revenue, investigation was carried out by the Directorate of Revenue Intelligence. It was revealed that the group of seven companies was being controlled by four brothers and that the companies had effected duty free imports of various raw-materials which were cleared by them in the local market though they were supposed to export the final products. The exports were shown to have been effected to certain parties in Nepal which were found to be fake transactions. Therefore, notices were issued under Section 124 of the Customs Act, 1962 read with proviso of Section 28(1) and Section 143-A thereof for determining payment of customs duty. The show cause notice was challenged by the respondents before the Commissioner of Customs by filing an appeal. The Commissioner of Customs, Excise and Gold (Control) by his order dated 30th July, 1996 discharged the show cause Notice, holding that the same is bad in law. The Central Board of Excise and Customs, however, reviewed the order on 9th July, 1997. An appeal was carried against the said order to the Central Excise and Gold (Control) Appellate Tribunal (CEGAT for short) which allowed the appeal by its order dated 9th June, 2000.

4. Feeling aggrieved, the Revenue has preferred the present application for making reference of certain important questions of law for determination of the

CEGAT. The application is filed on 15th February, 2001. The application is filed without any motion for condonation of delay since the Revenue has come out with a case that there was no delay caused in filing of the application. Still, however, in the reply affidavit filed on behalf of the respondents by Subhash Rastogi, one of the Director of M/s.Bachi Prasad & Sons Private Limited (respondent no.8), it is averred that the application is barred by limitation. It is pointed out that the application is required to be filed under Section 130-A of the Customs Act within 180 days of service of the order passed by the Tribunal. The respondents have thus raised objection as regards maintainability of the application on ground that it is barred by limitation. It is necessary, therefore, to deal with such objection before we proceed to entertain the application.

5. Section 130A of the Customs Act, 1962 provides for a period of 180 days from the date upon which a party concerned is served with the notice or an order under section 129B of the Customs Act. In the present case, it is submitted by the counsel for Respondent No.8 that the impugned order is dated 9th June 2000 and the present application for reference is filed beyond 180 days inasmuch as it is filed on 15th February 2001. To that, it is pointed out from the files of the Applicant

that as per the record, the order with respect to which reference is sought was received by the Commissioner of Customs on 22nd August 2000 and, therefore, the application is within time. Mr.Sahu for Respondent No.8 points out that the orders are supposed to be received by registered post. The impugned order was received by Respondent No.8 in the third week of June 2000. Similarly, the Applicant must have also received it at the same time and, therefore, it is his submission that the application is beyond time. As stated above, the Applicant is relying upon his record and which shows the inward entry of 22nd August 2000 and from that date the application is clearly within 180 days.

6. Mr.Jetly, learned counsel for the Applicant, alternatively submits that assuming that there is any delay in filing the application, this Court does have power to condone it under section 130A of the Customs Act. It is his submission that this power is implicit in this section and that is how the section has been read by different High Courts including various orders passed by this Court from time to time.

7. Before we deal with the judgments cited before us, we would like to refer to section 130A as well as similarly comparable sections in various taxing statute. Section 130A(1) of the Customs Act, with which we are

concerned, reads as follows:-

> "**130A. Application to High Court**.- (1) The Commissioner of Customs or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under section 129B passed before the 1st day of July 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment), by application to the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such other of the Tribunal."

8. As far as the Central Excise Act, 1944 is concerned, similar section for reference to the High Court is section 35H. The relevant part of that section is sub-section (1) which reads as follows:-

> "**35H. Application to High Court**.- (1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of

> the date upon which he is served with notice of an order under section 35C passed before the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal."

9. Under the Income Tax Act, a similar provision for reference of a case to the High Court is section 256 sub-section (2) of the Income Tax Act, which provides for 6 months from the date of issuance of service and there is no specific provision for condonation of delay if the application is filed beyond time. The said section 256 reads as under:-

> "256. (1) ......
>
> (2) If, on an application made under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner, as the

case may be, may, within six months from the date on which he is served with notice of such refusal, apply to the High Court, and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal shall state the case and refer it accordingly."

10. Then we refer to the Wealth Tax Act, 1957. Sub-section (2) of section 27 thereof provides for a similar application for a reference to the High Court. This section reads as follows:-

"**27. Reference of High Court**.- (1) ....

(2) .....

(3) If, on an application made under sub-section (1) the Appellate Tribunal.-

(a) refuses to state a case on the ground that no question of law arises; or

(b) rejects it on the ground that it is time barred;

> the applicant may, within ninety days from the date on which he is served with a notice of refusal or rejection, as the case may be, apply to the High Court, and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case to the High Court, and on receipt of such requisition the Appellate Tribunal shall state the case:
>
> Provided that, if in any case where the Appellate Tribunal has been required by an assessee to state a case the Appellate Tribunal refuses to do so on the ground that no question of law arises, the assessee may, within thirty days from the date on which he receives notice of refusal to state the case, withdraw his application, and if he does so, the fee paid by him under sub-section (1) shall be refunded to him."

11. It is material to note that all these sections provide for a certain period within which these applications are to be filed, but they do not make a specific provision for condonation of delay in the event the application is filed beyond the period specifically provided under the Act.

12. As far as the Acts passed by the State Legislature are concerned, we have one more example, i.e. section 61 of the Bombay Sales Tax Act whereunder also there is a similar provision without any provision for condonation of delay. This section reads as follows:-

> "**61. Statement of case to the High Court**.- (1) Within ninety days from the date of the communication of the order of the Tribunal, passed in appeal being an order which affects the liability of any person to pay tax or penalty or interest or to forfeiture or any sum or which affects the recovery from any person of any amount under section 39, that person, the Additional Commissioner of Sales Tax having jurisdiction over the whole of the State or the Commissioner, may by application in writing (accompanied, where the application is made by that person, by a fee of one hundred rupees) require the Tribunal to refer to the High Court any question of law arising out of such order, and where the Tribunal agrees, the Tribunal shall, as soon as may be after the receipt of such application, draw up a statement of the case and refer it to the High Court.

Provided that, if in the exercise of its power under this sub-section the Tribunal refuses to state the case which it has been required to do, on the ground that no question of law arises, that person, the Additional Commissioner of Sales Tax having jurisdiction over the whole of the State, or as the case may be, the Commissioner, may, within ninety days of such refusal, either withdraw his application (and if he does so any fee paid shall be refunded), or apply to the High Court against such refusal.

Provided further that, the Tribunal may refuse to refer the case to the High Court, if the person or, as the case may be, the Commissioner fails to submit the paper book and other documents required by the Tribunal, within a period of three months from the date of order of the Tribunal served on that person or, as the case may be, the Commissioner.

(2) If upon receipt of an application under sub-section (1), the High Court is not satisfied as to the correctness of the decision of the Tribunal, it may require the Tribunal to state the case and refer it; and accordingly, on

receipt of any such requisition the Tribunal shall state the case and refer it to the High Court.

(3) If the High Court is not satisfied that the statement in the case referred under this section are sufficient to enable it to determine the question raised thereby, it may refer the case back to the Tribunal to make such additions thereto or alterations therein, as the High Court may direct in that behalf.

(4) The High Court, upon the hearing of any such case, shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Tribunal a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Tribunal shall dispose of the case accordingly.

(5) Where a reference is made to the High Court under this section, the costs including the disposal of the fee referred to in sub-section (1), shall be in the discretion of the Court.

(6) The payment of amount of the tax, penalty,

> interest or sum forfeited if any, due in accordance with the order of the Tribunal in respect of which an application has been made under sub-section (1) shall not be stayed pending the disposal of such application or any reference made in consequence thereof, but if such amount is reduced as the result of such reference, the excess tax, penalty, interest or sum forfeited paid shall be refunded in accordance with the provisions of section 43."

13. Having noted these relevant provisions, the question comes up as to whether by any implication, it can be said that the Court has power to condone delay in the event such applications are filed beyond the time provided therefor. A Division Bench of Delhi High Court in **Prem Chand Bansal and Sons v. Income Tax Officer (Per Lahoti J., as His Lordship then was) reported in 237 (1999) I.T.R. 65**, has placed reliance on section 29 of the Limitation Act, and on page 67 of the report, it has referred to an earlier judgment of the Supreme Court in the case of **Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker - AIR 1995 SC 2272**. Thereafter it has held that section 5 of the Limitation Act will apply to the application under section 256(2) of the Income Tax Act. The relevant paragraphs are as follows:-

"The first question for consideration is whether the applicability of section 5 of the Limitation Act, 1963, is at all attracted. It is true that the period of limitation for filing an application under section 256(2) of the Income-tax Act is provided in section 256 itself and not by the Schedule appended to the Limitation Act. Here, the change in law brought by the introduction of the Limitation Act, 1963, over its predecessor enactment assumes significance. Under the Limitation Act, 1908, section 5 could not be applied to a period of limitation prescribed by special or local law unless its applicability was specifically attracted. Under section 29(2) of the Limitation Act, 1965, section 5 of the Limitation Act would apply to the periods of limitation prescribed by any special or local law unless such applicability is expressly excluded. It is not disputed that the applicability of the Limitation Act section 5 has not been excluded by section 256 of the Income-tax Act. This controversy stands resolved by the Supreme Court in Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker, AIR 1955 SC 2272. Their Lordships have held (headnote):

> "Section 19(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.
>
> There is no express exclusion anywhere in the Rent Act taking out the applicability of section 5 of the Limitation Act to appeals filed before appellate authority under section 18 of the Act. Consequently all the legal requirements for applicability of section 5 of the Limitation Act to such appeals in the light of section 29(2) of the Limitation Act can be said to have been satisfied."

For the foregoing reasons, we are of the opinion that section 5 of the Limitation Act, 1963, applies to petitions under section 256(2) of the Income-tax Act, 1961. Such is the view taken by a Division Bench of the Delhi High Court in CIT v. Taylor Instrument Co. (India) Ltd. (1992) 64 Taxman 6."

14. (i) We have a judgment of a Full Bench of the Madhya Pradesh High Court in the case of **Nihalkaran v. Commissioner of Wealth Tax - 168 (1987) I.T.R. 508**, which is on section 27 of the Wealth Tax Act, 1957. This Full Bench (Per N.D. Oza, CJ., as he then was in that Court) has also relied upon section 29(2) of the Limitation Act. The Full Bench held that section 27 of the Wealth Tax Act inter alia would apply to a special or local law unless their application is expressly excluded with the result that unless the application of section 5 was expressly excluded to an application under section 27(3) of the Wealth Tax Act, it would apply to the same.

. (ii) We have similar judgments from different High Courts. Thus, we have a judgment of the Punjab and Haryana High Court concerning the applicability of section 5 of the Limitation Act to a reference application under the Haryana General Sales Tax Act in the case of **State of Haryana v. Free While (India) Ltd.- 104 (1997) I.T.R. 259**. This judgment (Per Ashok Bhan J., as he then was) held that section 5 of the Limitation Act will get attracted to an application for reference in a similar situation.

. (iii) Then there is a judgment of the Calcutta High Court in the case of **Commissioner of Income Tax v.**

Orissa Concrete and Allied Industries Ltd. - 264 (2003) I.T.R. 186 to similar effect.

15. All these Division Benches of different High Courts have taken a view that section 5 of the Limitation Act would get attracted in view of section 29(2) of the Limitation Act.

16. Mr.Sahu, learned counsel for Respondent No.8, on the other hand, referred to a judgment of the Apex Court concerning section 4(2) of the Special Courts (Trial of offences relating to transactions in securities) Act, 1992. This is a judgment in the case of **Fairgrowth Investments Ltd. v. The Custodian - 2004(8) SCALE 817**. The question before the Court was as to whether a person raising an objection under section 4(2) of the Act to any steps taken by the Custodian is required to take those steps within the period specified therein only. Section 3(2) of the Act provides that the Custodian on being satisfied or on receiving information may notify that a particular person is involved in any of the offences relating to transactions in securities, as laid down therein. Section 4(2) of the Act provides that a person aggrieved by such notification or any other order made by the Custodian may file an objection within 30 days objecting to this decision of the Custodian to the Special Court. This section reads as follows:-

"**4. Contracts entered into fraudulently may be cancelled**.- (1) ....

(2) Any person aggrieved by a notification issued under sub-section (2) of section 3 or any cancellation made under sub-section (1) of section 4 or any other order made by the Custodian in exercise of the powers conferred on him under section 3 or 4 may file a petition objecting to the same within thirty days of the assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President before the Special Court where such notification, cancellation or order has been issued before the date of assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President and where such notification, cancellation or order has been issued on or after that date, within thirty days of the issuance of such notification, cancellation or order, as the case may be; and the Special Court after hearing the parties, may make such order as it deems fit."

17. The question before the Apex Court was as to

whether such an application raising objection could be filed beyond the period of 30 days. The Apex Court noted that as far as that Act is concerned, wherever a provision for condonation of delay was to be made, the statute did provide for the same and this could be seen under section 10(3) of the Act. The Apex Court also referred to section 13 of the Act in para 19 of the judgment which lays down that this Act has an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Referring to this specific provision, the Court came to the conclusion that the application under section 4(2) could not be said to be containing the liberty to apply for condonation of delay. The Court held that the provision of condonation of delay has to be specifically provided or has to be read by implication. In view of the aforesaid reading of the statute, the Apex Court held that the section could not be said to be containing the provision for condonation of delay. Mr.Sahu pressed the above judgment into service and submitted that in view of these guidelines from the Apex Court, it was expected of this Court to follow the same.

18. We have given our anxious consideration to this judgment referred to by Mr.Sahu. Apart from specific discussion in the judgment, as can be seen from paragraphs 11, 17 and 19 thereof, it is to be noted that

the Act essentially is for curbing and dealing with certain offences relating to transactions in securities. It is in such context that the Court has held that one cannot read the provision for condonation of delay. In the present case, we are concerned with a taxing statute and as we have seen from a reference of catena of judgments concerning Income Tax Act, Wealth Tax Act, Central Excise Act and Sales Tax Act, a provision for condonation will have to be read as included in section 130A of the Customs Act. In the circumstances, assuming there was any delay in filing the application and considering that the administrative decision has a bearing on condonation of delay, the application therefore cannot be rejected on this ground.

19. Apart from what we have stated in the foregoing paragraph, it is essential to note that the Apex Court did consider Section 4(2) of the Special Courts (Trial of Offences relating to transactions in securities) Act, 1992 pertaining to criminal proceedings. In the present case, we are required to deal with a special law in the context of taxation and hence the judgments in relation to alike provisions of other statutes on taxation would be more relevant and applicable. The interpretation of other similar provisions, which are pari materia will have to be applied in preference to interpretation of a provision which is of dissimilar nature and is contained

in special procedure for trial of offences relating to transactions in securities. It may be further noted that Section 29(2) of the Limitation Act is attracted when the special or local law does not contain provision so as to exclude applicability of Sections 4 to 24 thereof. We have noticed that the Customs Act, 1962 does not contain any provision which excludes applicability of Sections 4 to 24 of the Limitation Act. Needless to say, Section 5 of the Limitation Act would be applicable and as such the delay, if any, can be condoned in the proceedings contemplated under Section 130-A of the Customs Act. In our opinion, the power to condone the delay is available under the special statute unless it is a self-contained code in so far as the provisions about limitation are concerned. In this view of the matter, we are not inclined to accept the submission of Mr.Sahu. We deem it proper to hold that there is no delay in filing of the application under Section 130-A of the Customs Act and if at all there is some delay then it is liable to be condoned.

20. The second submission of Mr.Sahu was that under section 130A of the Customs Act, the application has to be with respect to an order passed under section 129B of the Act. He points out that in the instant case, it was initially an order of the Central Board of Excise and Customs referable under section 129D of the Customs Act.

It is thereafter that appeals were preferred to the CEGAT and which appeals have come to be decided by order dated 9th June 2000 with respect to which this reference is sought. Now, in this connection, we must refer to sub-section (4) of section 129D of the Customs Act which in the later part provides that provisions of this Act regarding appeals including the provisions of sub-section (4) of section 129A shall, so far as may be, apply to an application. Inasmuch as this sub-section (4) specifically provides that the provisions of this Act regarding appeals shall apply to the proceedings before the Board, once the order passed by the Board is carried in appeal to the CEGAT, an application for reference concerning the questions of law arising therein will certainly have to be held as valid and maintainable. We do not find any merit in this objection as well.

21. In the facts of the present case, in our view, the following three questions arise for determination:

(i) Whether the issue of confiscation and fine can be decided without first deciding the liability to duty?

(ii) Whether the Tribunal can disregard the facts on record that the Nepal parties, to whom the goods

were sent, were non-existent and the customs and commerce departments of the Nepal Government have confirmed that no such goods have been received in their country and that there is no corresponding evidence of export to Hongkong and USA from Nepal?

(iii) Whether the Tribunal is correct in holding that the advance licenses were valid till the same are cancelled?

(iv) Whether the Tribunal can reach the above conclusion without taking into account the law laid down by the Supreme Court in the case of M/s Fedco (P) Ltd. & another v. S.N. Bilgrami & others reported in 1999 (110) ELT 92 (SC)?

22. The Tribunal will draw up the statement of the case and refer it to the High Court at the earliest.

. This application is accordingly allowed and disposed of.

(H.L. GOKHALE, J.)

(V.R. KINGAONKAR, J.)